Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

POOJA GOSWAMI, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

AMERICAN COLLECTIONS ENTERPRISE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals has ruled that a collection agency can put "benign language" on the outside of an envelope containing a collection letter, even though the statute, Section 1692f(8) of the FDCPA, says a debt collector cannot put any language except a return address and a name. This decision will impact millions of American consumers across the country. It is the difference between millions of collection envelopes going through the U.S. mail containing nothing on the outside except a return address and millions of collection envelopes going through the U.S. mail containing words and symbols that a debt collector thinks it can argue is "benign." Given the importance of this issue, this Court should review the following questions:

1. Whether Courts should look only at the plain text of Section 1692f(8) of the federal Fair Debt Collection Practices Act or look to FTC Staff Commentary and Legislative History to interpret the statute's meaning?

2. Whether Congress intended Section 1692f(8) of the federal Fair Debt Collection Practices Act to have an exception for "benign language" placed on the outside of a collection envelope sent to a debtor?

PARTIES TO PROCEEDING

Petitioner is Pooja Goswami.

Respondent is American Collections Enterprise, Inc.

RULE 29.6 STATEMENT

Pooja Goswami is an individual who resides in the State of Texas.

American Collections Enterprise, Inc. ("ACEI") is a corporation organized and existing under the laws of the Commonwealth of Virginia and has its principal office located at 6032 Cliff Drive, Alexandra, Virginia 22315. ACEI is a collection agency engaged in the business of collecting delinquent consumer debts from consumer debtors on behalf of creditors. ACEI is privately owned by individual shareholders. ACEI is not owned by a parent and is not a public company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Pooja Goswami respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was published at 377 F.3d 488 (5th Cir. 2004). (App. at 1a). Petition for Rehearing was denied with opinion at 395 F.3d 225 (5th Cir. 2004). (App. at 20a).

The decision of the United States District Court is published at 280 F.Supp.2d 624 (S.D. Tex. 2003). (App. at 14a).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 28, 2004. (App. at 1a). Petition for rehearing was denied on December 22, 2004, with opinion. (App. at 20a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provision involved is 15 U.S.C 1694f and is attached at App. at 29a.

STATEMENT OF THE CASE

Pooja Goswami, a consumer debtor, filed suit against American Collections Enterprise, Inc. ("ACEI") for violating Section 1692f(8) of the FDCPA by sending her a collection letter in an envelope with the words "PRIORITY LETTER" written across the outside front of the envelope. Jurisdiction in the trial court was based on 28 U.S.C. § 1331, because the case involved a federal question, and on 28 U.S.C. §1337(a).

The District Court held that ACEI's use of the envelope did not violate section 1692f(8).[1] The District Court reasoned that although the plain language of section 1692f(8) prohibits placing any language on the outside of an envelope except the return address of the debt collector and the debt collector's name (if there is no reference to debt collection in the name), that such a statutory prohibition would be an unconstitutional restraint of a debt collector's free speech if strictly construed.[2] The District Court divined that Section 1692f(8) was meant to protect debtors from "extra embarrassment by shielding the nature of debt collection letters from others."[3] The District Court held that the language "PRIORITY LETTER" was not a message that "a disinterested, reasonable person" would understand to refer to "the addressee's status as a deadbeat."[4]

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[1] *Goswami v. American Collections Enterprise, Inc.*, 280 F.Supp.2d 624, 627 (S.D. Tex. 2003).

[2] 280 F.Supp.2d at 626.

[3] 280 F.Supp.2d at 627.

[4] *Id.*

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the judgment of the District Court with respect to ACEI's envelope.[5] In its opinion, the Court of Appeals ignored the First Amendment discussion relied upon by the District Court to justify looking behind the plain language of the statute. The Court of Appeals instead reasoned that because the statute was ambiguous it would look beyond the text of the statute. The Court of Appeals found Section 1692f(8) ambiguous, because it found that there was more than one reasonable interpretation of that statute. Reading Section 1692f(8) in isolation, the Court of Appeals acknowledged that the language to bar any markings whatsoever on the outside of the envelope other than the names and addresses of the parties.[6] Reading Section 1692f(8) together with the opening paragraph of Section 1692f, which prohibits "unfair and unconscionable conduct," the Court of Appeals understood that the language could then be understood to bar only markings that "would signal that it is a debt collection letter" or would "tend to humiliate, threaten, or manipulate debtors."[7] This second reading was found to exemplify the alleged ambiguity.

After reaching the conclusion that the text of Section 1692f(8) was ambiguous, the Court of Appeals looked beyond the text of the statute to interpret its meaning. The Court of Appeals first looked at the FTC's Staff Commentary on Section 1692f, with which

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[5] *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 494 (5th Cir. 2004).

[6] 377 F.3d at 493.

[7] *Id.*

it was "most persuaded."[8] That FTC Staff Commentary states that a debt collector does not violate Section 1692f(8) by using language that does not "suggest the purpose of the communication."[9] The Court of Appeals next looked at the "legislative history" of the Code, which it believed fully supports the FTC's interpretation of Section 1692f(8).[10] The Court of Appeals looked only at summary comments in Senate Report No. 95-382 that state that Section 1692f prohibits communicating with a debtor about a debt "by postcard; and using symbols on envelopes indicating that the contents pertain to debt collection."[11] Finally, the Court of Appeals observed that several district courts have adopted a "benign language" exception to Section 1692f(8) allowing for markings such as "priority letter."[12] The Court of Appeals failed to review the two years of legislative history and multiple previous versions of the legislation that preceded the version of the FDCPA that was ultimately enacted.[13]

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[8] *Id.*.

[9] *FTC Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed.Reg. 50,097, 50108 (December 13, 1988).

[10] 377 F.3d at 494.

[11] *Id.*, (quoting S.Rep. No. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1702).

[12] *Id.*

[13] H.R. 10191, 94th Cong., 1st Sess. (1975); H.R. 11969, 94th Cong., 2d Sess. (1976); *Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency and Housing, of the United States House of Representatives on H.R. 11969*, 94th Cong., 2d Sess. (1976); H.R. 13720, 94th Cong., 2d Sess. (1976); H.Rpt. No. 94-1202; 122 Cong. Rec. H. 7789 (daily ed. July 27, 1976); H.R. 29, 95th Cong., 1st Sess. (1977); H.R. 5294, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. H. 10239 (daily ed. April 4, 1977); S. 656, 95th Cong., 1st Sess. (1977); S. 918, 95th Cong., 1st Sess. (1977); S. 1130, 95th Cong., 1st Sess. (1977); *Hearing Before the Subcommittee on Consumer Affairs of the Committee of Banking, Currency, and*

Goswami petitioned for a rehearing before the Court of Appeals *en banc* on this issue. The petition failed to obtain the necessary votes from the *en banc* court, and the panel treated the petition as a petition for rehearing by the panel. On December 22, 2004, the panel denied the petition for rehearing in a *per curium* opinion.[14] The Court of Appeals cited the Eighth Circuit's opinion in *Strand v. Diversified Collection Services, Inc.*, 380 F.3d 316 (8th Cir. 2004), which reached a similar conclusion, but based it on a different approach.[15]

Judge Jerry E. Smith filed a dissenting opinion with which Judge DeMoss joined.[16] In his dissent, Judge Smith argued that the Court of Appeals "made an erroneous interpretation of this important statute."[17] Judge Smith also argued that the Court of Appeal invented a new and unusual way of interpreting statutes that have general, introductory statements followed by specific provisions.[18] Judge Smith pointed out that this new approach applied by the Court of Appeals is in conflict with the well-accepted maxim that specific provisions prevail over general ones.[19] Finally, Judge Smith pointed out that the Court of Appeals ignored its previous opinion in *Peter v. GC Services, LP*,

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Housing and Urban Affairs of the United States Senate on S. 656, S. 918, S. 1130, and H.R. 5294, 95th Cong., 1st Sess., (1977); Senate Committee Print No. 1, 95th Cong., 1st Sess. (1977).

[14] *Goswami v. American Collections Enterprise, Inc.*, 395 F.3d 225 (5th Cir. 2004)(*per curium* opinion on petition for rehearing *en banc*).

[15] 395 F.3d at 226.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] 395 F.3d at 227-28.

310 F.3d 344 (5th Cir. 2002) which held that looking only at the text of Section 1692f(8) did not lead to an absurd result, and therefore the Court of Appeals may not look beyond the language of the statute.[20]

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari should be granted for three principal reasons. First, there is a conflict of decisions between the Circuit Courts of Appeals on the issue of whether Section 1692f(8) is ambiguous and whether a court may look beyond the plain text of the statute to interpret its meaning. Second, the Court of Appeals has so departed from the accepted and usual course of statutory construction as to require this Court to exercise its supervisory power to correct it. Third, the Court of Appeals, by deciding that there is a "benign language" exception to Section 1692f(8), has decided an important question of federal law that has not been, but should be, settled by this Court.

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[20] 395 F.3d at 228.

I. There is a Conflict of Decisions Between the Courts of Appeals for the Fifth and Eighth Circuits on the Issue of When a Court May Look Beyond the Text of Section 1692f(8) to Interpret its Meaning and Whether There is a "Benign Language" Exception to Section 1692f(8).

The Eighth Circuit Court of Appeals' opinion in *Strand v. Diversified Collection Services, Inc.*, 380 F.3d 316 (8th Cir. 2004) is in conflict with the Fifth Circuit Court of Appeals' opinion in the case below and its previous opinion in *Peter v. GC Services, L.P.*, 310 F.3d 344 (5th Cir. 2002).

A. The Eighth Circuit's Opinion in *Strand v. Diversified Collection Services, Inc.*

In *Strand v. Diversified Collection Services, Inc.*, the Court of Appeals for the Eighth Circuit applied yet a different rule of statutory construction to Section 1692f(8). The Eighth Circuit held that there was "sufficient doubt" about the scope of the word "name" in Section 1692f(8) to permit the Court to look beyond the text of the statute to the "Congressional purposes underlying the FDCPA."[21] The Eighth Circuit held that Section 1692f(8) prohibits only language on the outside of an envelope that pertains to debt collection.[22]

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[21] *Strand v. Diversified Collection Services, Inc.*, 380 F.3d 316, 318 (8th Cir. 2004).

[22] 380 F.3d at 319.

B. The Fifth Circuit's Opinion in the Case Below and in its Prior Opinion in *Peter v. GC Services, L.P.*

The Fifth Circuit Court of Appeals in *Peter* held that the text of Section 1692f(8) read as a whole does not lead to an absurd result and therefore courts may not look beyond its text to interpret its meaning.[23] In *Peter*, the Court of Appeals deferred ruling on whether there is a "benign language" exception to Section 1692f(8), because it held that the language used on the outside of the envelope in that case was clearly not benign.[24]

The Court of Appeals below held that Section 1692f(8) was ambiguous, because reading the text of Section 1692f(8) in isolation creates one reasonable interpretation, and reading the preface of Section 1692f together with subsection (8) of that section creates another reasonable interpretation.[25] Given the perceived ambiguity, the Court of Appeals looked beyond the text of Section 1692f(8) to interpret its meaning. After reviewing the FTC Staff Commentary and Senate Report 95-382, the Court of Appeals held that Section 1692f(8) only prohibits language on the outside of an envelope that "intimates the contents of the envelope relate to collection of delinquent accounts" and thus is "threatening or embarrassing."[26]

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[23] *Peter v. GC Services, LP*, 310 F.3d 344, 351 (5th Cir. 2002).

[24] 310 F.3d at 351-52.

[25] *Goswami*, 377 F.3d at 493.

[26] 377 F.3d at 494.

Because of the conflicting decisions of the Circuit Courts of Appeals on how to interpret the text of Section 1692f(8) and on the issue of whether there is a "benign language" exception to section 1692f(8), this Court should grant certiorari and resolve the conflict.

II. The Court of Appeals, by Not Interpreting the Plain Language of Section 1692f(8) as Required by This Court's Decision in *Heintz v. Jenkins*, Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of This Court's Supervisory Power.

The Court of Appeals, by creating a new way to find ambiguity, has so far departed from the accepted and usual course of statutory construction that this Court should exercise its supervisory power to correct it. This Court in *Heintz v. Jenkins*[27] held that courts should construe the plain language of the FDCPA, accord words and phrases their ordinary and natural meaning, and not imply exceptions that are inconsistent with "the range of reasonable interpretations of the Act's express language."[28] In *U.S. v. Ron Pair Enterprises, Inc.*, this Court reiterated the long standing notion that "[w]here, as here, the statute's language is plain, 'the sole function of the courts is to

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[27] 514 U.S. 291, 115 S.Ct. 1489 (1995).

[28] *Heintz v. Jenkins*, 514 U.S. at 298; *See also, Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir.1994), *aff'd*, 514 U.S. 291 (1995)(stating "We must faithfully apply the law as Congress has drafted it. We should not disregard plain statutory language in order to impose on [a] statute what we may consider [to be] a more reasonable meaning.").

enforce it according to its terms.'"[29] The language of Section 1692f(8) is plain, clear, and express – place no language on the outside of a collection envelope except a return address and the collector's name. To apply a rule of construction to find this plain language ambiguous is a great departure from settled law.

The Court of Appeals also wrongly relied on FTC Staff Commentary and Senate Report 95-382. First, this Court held in *Heintz* that a court cannot rely on FTC commentary where that commentary contradicts the plain language of the FDCPA.[30] This Court has also cited *Heintz v. Jenkins* for the proposition that legislative comments by a Senator interpreting the meaning of a statute "may express the Senator's interpretive preference, but that preference cannot overcome the language of the statute and the related considerations we have discussed."[31] By relying on FTC commentary and Senate Report 95-382 over the plain, express language of Section 1692f(8), the Court of Appeals clearly departed from accepted and usual rules of statutory construction.

The Court of Appeals also clearly departed from accepted and usual rules of statutory construction set out by this Court when it construed the general preface language of Section 1692f with the specific language of Section 1692f(8) to find an ambiguity. In statutory

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[29] 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989)(*citing Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917)); *See Romine v. Diversified Collection Services, Inc.*, 155 F.3d 1142, 1146 (9th Cir. 1998).

[30] 514 U.S. at 298.

[31] *Chickasaw Nation v. United States*, 534 U.S. 84, 93, 122 S.Ct. 528, 534 (2001).

construction, the specific should always prevail over the general.[32] The Court of Appeals ignored this rule and allowed the specific and the general to create ambiguity where there was none. This Court should grant certiorari to correct the Court of Appeals below.

III. The Court of Appeals, by Looking Behind the Text of Section 1692f(8) and Deciding That There is a "Benign Language" Exception to Section 1692f(8), Has Decided an Important Question of Federal Law That Has Not Been, But Should be, Settled By This Court.

The Court of Appeals, by deciding that Section 1692f(8) is ambiguous using a new method of statutory construction, and by holding that there is a "benign language" exception to Section 1692f(8), has decided important questions of federal law that have not been, but should be, settled by this Court. There are actually two propositions, both of which are important to the jurisprudence of the FDCPA, for which the Court of Appeals' decision stands: (1) that a court should read a specific "laundry list" provision of a section alone and then along with the more general introductory paragraph of that section to determine if the specific provision is ambiguous, and (2) that when looking beyond the text of Section 1692f(8), the FTC Staff Commentary and legislative history show Congress' intent to prohibit only that language placed on the outside of a collection envelope that intimates the

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[32] *Varity Corp. v. Howe*, 516 U.S. 489, 411, 116 S.Ct. 1065, 1077 (1996).

contents relate to debt collection and that language that is threatening or embarrassing to the debtor.

A. The Court of Appeals' Decision Will Cause Confusion in the Courts Below.

These issues are important and if left unsettled will confuse the courts below. It is clear from the dissent in the Court of Appeals opinion on petition for rehearing that there is confusion within the Fifth Circuit Court of Appeals on not only this specific issue, but on the issue of what rules of statutory construction should be used in general. It is also clear from the difference in methods used by the Fifth Circuit in this case below, the Eighth Circuit in *Strand v. Diversified Collection Services, Inc.*, and the various district courts[33] that there is confusion within and between the circuits as to which rules of statutory construction to apply in interpreting Section 1692f(8). This Court should grant certiorari and settle these important issues before the confusion grows.

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[33] *Lindbergh v. Transworld Sys., Inc.*, 846 F.Supp. 175, 180 (D.Conn. 1994); *Johnson v. NCB Collection Servs.*, 799 F.Supp. 1298, 1305 (D.Conn. 1992); *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456, 1461 n.10 (C.D. Cal. 1991)(reading the introductory language to expand the scope of proscriptions in § 1692f).

B. The Decision Will Lead to Debt Collector Experimentation with Language on Envelopes, Which Will Impact Millions of Consumer Debtors Across the Country and Lead to Increased Litigation.

The Court of Appeals' decision gives collection agencies license to freely experiment with language on the outside of collection envelopes. The language debt collectors put there will be visible for the debtor's mailman, neighbors, family and friends to see. Debt collectors will no doubt "push the envelope" by experimenting with language that they hope will grab the debtor's attention, increase the odds she will open it, and force her to pay more attention to the contents of the collection letter inside and pay. This will impact consumer debtors across the country. There are at least 3,000 consumer collection agencies in the United States.[34] These collections agencies dispatch hundreds of millions of collection letters each year to consumer debtors across the United States. One collection letter vendor, Lason, Inc., boasts in its website that it is currently sending out 250,000 collection letters each month[35] and has grown by 75% in the past year. The Court of Appeals' decision will mean the difference between millions of collection envelopes going through the U.S. mail containing nothing on the outside except a

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[34] ACA International, the trade association for debt collectors formerly known as the American Collectors Association, reports on its website, located at http://www.acainternational.org, that there are currently more than 3,400 collection agency members, of which 300 are international members in 50 different countries.

[35] http://www.lason.com/case_studies/clcs.htm.

return address and millions of collection envelopes going through the U.S. mail containing words and symbols that debt collectors will argue are "benign." Whether this Court decides to read only the language of Section 1692f(8) or look beyond the statute's text to legislative history, the impact of the decision will have consequences on a national scale.

The increased experimentation by collection agencies with language on the outside of their collection envelopes will no doubt lead to increased litigation over whether the language used is "benign language," whether the language is "threatening or embarrassing," and whether the language in any way intimates the contents are about a collection matter. An entire body of case law will grow in the lower federal courts, which will become conflicting, confusing the state of the law in an area that should not be unclear given the simplicity and clarity with which Congress wrote Section 1692f(8).

It is important for this Court to settle the issue.

C. The Court of Appeals' Decision Will Affect Interpretations of Other Provisions of the FDCPA.

How to interpret a specific provision of the FDCPA in those sections containing specific provisions in a "laundry list" fashion below a general statement is an important question of law that this Court should decide. Application of the Court of Appeals' new method of statutory construction will lead to confusing interpretations of other provisions of the FDCPA. The three sections of the FDCPA containing a large bulk of the prohibitions of debt collector conduct – Sections

1692d, 1692e, and 1692f – rely on the same structure in terms of having general, introductory statements followed by a list of specific actions that constitute violations of the general prohibition. The general, introductory statement to Section 1692d prohibits a debt collector from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person."[36] There are then six specific paragraphs listed under Section 1692d that describe conduct that "is a violation of this section."[37] The general, introductory statement to Section 1692e prohibits a debt collector from using "any false, deceptive, or misleading representation or means."[38] There are sixteen specific paragraphs listed under Section 1692e that describe conduct that "is a violation of this section."[39] Finally there is Section 1692f. The general, introductory statement to Section 1692f prohibits a debt collector from using "unfair or unconscionable means." There are eight specific paragraphs listed under Section 1692f that describe conduct that "is a violation of this section."[40] This makes for a total of thirty specific paragraphs that courts could now find ambiguous and interpret looking at the legislative history.

If this Court does not settle this issue, other circuit courts will be able to look beyond the text of all 30 of these specific, and quite plain, provisions of the FDCPA and legislate meaning into them. This Court should reaffirm Congress' clear purpose in writing the

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[36] 15 U.S.C. § 1692d.
[37] 15 U.S.C. § 1692d.
[38] 15 U.S.C. § 1692e.
[39] 15 U.S.C. § 1692e.
[40] 15 U.S.C. § 1692f.

provisions of the FDCPA in such a clear, simple and concise manner – to avoid "clarifications," "interpretations," and absolute judicial legislation in this area.

Given the hundreds and hundreds of pages of legislative history that led to enactment of the FDCPA, the Court of Appeals' new approach to statutory construction will no doubt lead to a plethora of judicial legislation interpreting these 30 specific prohibitions in the FDCPA. The issue of how the courts should construe these "laundry list" provisions of the FDCPA is one that this Court has not decided, but should.

D. This Court Should Settle the Rules of Statutory Construction that Should be Applied to Interpret Provisions of the FDCPA.

Given the rules of statutory construction that this Court has laid out through the years, the Court of Appeals should never have looked beyond the text of Section 1692f(8) to interpret its meaning. This Court has always held to the obvious principals that any analysis of a statute by the courts must be "tethered and true to the text" of the statute,[41] and the court must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative

[41] *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 356, 114 S.Ct. 1599, 1603 (1994).

purpose."[42] A court may only look beyond the plain language of the statute if the statutory language is ambiguous.

The Court of Appeals has now found a new way to read the "laundry list" provisions of the FDCPA to find an ambiguity in its specific and clearly worded prohibitions. The new approach used by the Court of Appeals contradicts this Court's previous rulings involving construction of statutes with general and specific provisions that seem to conflict. This Court has applied the canon of construction that "the specific governs the general," which essentially recognizes that a court should not apply a general provision of a statute when doing so would undermine the limitations created by a more specific provision.[43]

Even if this Court were to agree with the Court of Appeals that reading Section 1692f(8) with the introductory paragraph of Section 1692f makes for an apparent ambiguity, this Court has consistently stated that statutory construction is a "holistic endeavor," and:

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[42] *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403, 407 (1990); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 105 S.Ct. 658, 661-62 (1985).

[43] *Varity Corp. v. Howe*, 516 U.S. 489, 411, 116 S.Ct. 1065, 1077 (1996); *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85, 112 S.Ct. 2031, 2037 (1992) (Court holding that general remedies savings clause that was relic of pre-ADA/no pre-emption regime could not be allowed to supersede specific, substantive pre-emption provision of ERISA); *See also HCSC-Laundry v. U.S.*, 450 U.S. 1, 5-6, 101 S.Ct. 836, 838-39 (1981) (Court holding that specific provision 26 U.S.C. § 501(e) controlled over more general provision of Section 501(c)(4) with respect to tax exempt status for cooperative hospital service manager).

> "a provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[44]

A holistic approach to interpreting Section 1692f(8) requires a court to look also at Section 1692b(5). That section, worded very similarly, prohibits a debt collector from using language either on an envelope or in the contents of a communication "that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt."[45] Congress' use of this language in Section 1692b(5) shows that had Congress intended for Section 1692f(8) to prohibit only language that indicated the communication was about a debt, Congress would have used the language used in Section 1692b(5). Congress chose not to do so.

Congress wrote Section 1692f(8) in a clear and simple manner in order to avoid just such interpretations and judicial legislation. Congress' intent to maintain control over legislation in this area can be seen, *infra*, in the legislative history of its

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[44] *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988); See also *Koons Buick Pontiac GMC, Inc. v. Nigh*, ___ U.S. ___, 125 S.Ct. 460, 466-67 (2004); *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737 (1991).

[45] 15 U.S.C. § 1692b(5).

decision to prohibit even the FTC from interpreting the provisions of the FDCPA.

The Court of Appeals' application of its new method for statutory construction is a radical departure from the accepted and usual rules of statutory construction. This Court has not decided whether such a method should be used in construing the "laundry list" sections of the FDCPA. This is an important federal issue and should be settled by this Court.

E. Courts Should Not Give Weight to FTC Commentary in Interpreting Provisions of the FDCPA.

If a court is to look beyond the text of Section 1692f(8), or any other provision of the FDCPA, to interpret its meaning as the Court of Appeals did below, this Court should settle the question of whether a court may give weight to the FTC's Commentary. This is an important issue. Lower courts frequently rely on FTC Staff Commentary and FTC opinion letters, which are plentiful, yet there is evidence in the legislative history of the FDCPA that Congress did not desire the FTC to have the power to "clarify" the meaning of provisions of the FDCPA.

Congress made its intent clear in the legislative history that it did not want the FTC to have the power to interpret the meaning of provisions of the FDCPA. Congress considered granting interpretive power to the FTC in an early House Bill, but removed the power in later bills. H.R. 11969 contained a section that allowed the FTC to prescribe regulations necessary to

clarify the provisions of the FDCPA.[46] On May 11, 1976, the Subcommittee on Consumer Affairs of the Committee of Banking, Currency and Housing met in an executive session and adopted a number of amendments to H.R. 11969, one of which was the removal of this section granting the FTC any interpretive power. On May 13, 1976, Representative Frank Annunizo introduced H.R. 13720, which also left out this interpretive rule making authority.[47]

Representatives Annunzio and Wylie expressed their intentions in their later comments on a subsequent bill. On April 4, 1977, in the open House debate on newly introduced H.R. 5294, Representative Annunizo stated: "I want to make a special point: No federal agency will write regulations for this legislation."[48] Representative Annunizo later commented in those same debates "The Federal Trade Commission will be responsible for the enforcement of this legislation. However, as I said earlier, no regulations will be issued."[49] Finally, on May 12, 1977, Representative Chalmers Wylie, in his statement in the hearings before the Senate Subcommittee on Consumer Affairs made clear that anyone wanting a change or clarification of the FDCPA would have to come to Congress and seek an amendment; not seek a "clarification" from the FTC:

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[46] *Hearings Before the Subcommittee on Consumer Affairs of the Committee on Banking, Currency and Housing, of the United States House of Representatives on H.R. 11969*, p. 17, 94th Cong., 2d Sess. (1976).

[47] H.Rpt. No. 94-1202, p.4.

[48] 123 Cong. Rec. H. 10241 (daily ed. April 4, 1977).

[49] *Id.* at 10242.

> Congress should retain the final authority to avoid any misunderstanding as to intent. If the question of Congressional intent arises, the FTC must come back to Congress for guidance. Time and again, regulations have been adopted pursuant to a law that Congress has enacted only to have it translated into detail which expanded its meaning and added to enforcement problems.[50]

It is clear from the legislative history that the last thing Congress wanted was for the FTC to have any impact upon interpretation of provisions of the FDCPA.[51]

F. Where A Court Looks Beyond the Text of a Provision of the FDCPA, Whether It May Review Select Bits of Legislative History or Must Review All Relevant Legislative History is an Important Issue in the Law of Statutory Construction.

In interpreting the meaning of Section 1692f(8), the Court of Appeals looked only at the summary comments included in Senate Report 95-382 and ignored all other legislative history. Whether a court

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[50] *Hearing Before the Subcommittee on Consumer Affairs of the Committee of Banking, Currency, and Housing and Urban Affairs of the United States Senate on S. 656, S. 918, S. 1130, and H.R. 5294*, 95th Cong., 1st Sess., (1977), page 49.

[51] This Court has also refused to consider the FTC's interpretation of the FDCPA where that interpretation was against the language of the statute. *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489 (1995).

may look at only select pieces of legislative history to the exclusion of other pieces is an important issue of federal law that his Court should settle. The legislative history behind the FDCPA is extensive, and this case illustrates that when a court decides to look behind the text of a statute it should look at all of the relevant legislative history.

Debate on and passage of the FDCPA was a long and complicated process. The House of Representatives introduced five bills between 1975 and 1977.[52] The Senate considered the House bill that passed the House, H.R. 5294, along with three competing Senate bills.[53] Tracing the path of the provision that ultimately became Section 1692f(8) through the House and Senate bills paints a picture of its meaning that should not be ignored.

The text that was eventually codified at Section 1692f(8) was found in S.656, S.918, and H.R. 5294 in the section on "acquisition of location information," eventually codified as Section 1692b. These three bills were all considered together in the Senate Subcommittee hearings on May 12 and 13, 1977.[54] In each of those separate bills, the provision that is now Section 1692f(8) was followed by a different provision

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[52] H.R. 10191, 94th Cong., 1st Sess. (1975); H.R. 11969, 94th Cong., 2d Sess. (1976); H.R. 13720, 94th Cong., 2d Sess. (1976), H.R. 29, 95th Cong., 1st Sess. (1977); and H.R. 5294, 95th Cong., 1st Sess. (1977).

[53] S. 656, 95th Cong., 1st Sess. (1977); S. 918, 95th Cong., 1st Sess. (1977); S. 1130, 95th Cong., 1st Sess. (1977).

[54] *Hearing Before the Subcommittee on Consumer Affairs of the Committee of Banking, Currency, and Housing and Urban Affairs of the United States Senate on S. 656, S. 918, S. 1130, and H.R. 5294*, 95th Cong., 1st Sess., (1977).

that expressly prohibited language in the text of a communication that "indicates that the communication relates to the collection of a debt, other than the identification of the person as a debt collector."[55]

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[55] S. 656 included a provision reading as follows:

§ 803. Acquisition of location information

* * *

(b) Any debt collector communicating with any person for the purpose of acquiring location information about any consumer shall –

(5) Not use any language or symbol other than the debt collector's address, on any envelope when using the mail or telegrams, except that the debt collector may use the company name provided that such name does not indicate that the company is in the debt collection business

(6) Not use any language or symbol in the contents of mail or telegrams that indicates that the communication relates to the collection of debt, other than the identification of the person or debt collector;

S. 918 included a provision reading as follows:

§ 804. Acquisition of location information

* * *

(b) Any debt collector communicating with any person for the purpose of acquiring location information about any consumer shall –

(5) Not use any language or symbol other than the debt collector's address, on any envelope when using the mail or telegrams, except that the debt collector may use the company name provided that such name does not indicate that the company is in the debt collection business;

(6) Not use any language or symbol in the contents of mail or telegrams that indicate that the communication relates to the collection of a debt, other than the identification of the person as a debt collector;

H.R. 5294 included a provision reading as follows:

§ 803. Acquisition of location information

* * *

After the Senate Subcommittee hearings, Senator Riegle, who had introduced S. 918, offered a bill that was a composite of all four of the bills that had been considered in the hearings. His composite bill was designated "Committee Print No. 1." On June 30 and July 26, 1977, the Senate Committee on Banking, Housing, and Urban Affairs met in open markup sessions. The Committee approved Senator Riegle's "Committee Print No. 1" with amendments, then substituted the text of the bill for that of H.R. 5294.[56] Committee Print No. 1 included the language of the provision regarding envelopes and the language of the provision regarding communications into one provision that is now codified as Section 1692b(5). That provision prohibited a debt collector from using any language on an envelope or in a communication "that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt."[57] Committee Print No. 1 placed a separate provision relating only to envelopes as the last

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(b) Any debt collector communicating with any person for the purpose of acquiring location information about any consumer shall –

(5) not use any language or symbol, other than the debt collector's address, on any envelope when using the mail or telegrams except the debt collector may use the name of the company employing such debt collector provided that such name does not indicate that the company is in the debt collection business; and

(6) not using any language or symbol in the contents of mail or telegrams that indicates that the communication relates to the collection of a debt, other than the identification of the person of the debt collector.

[56] Submitted for vote in the Senate as H.R. 5294 on August 5, 1977, and passed by the Senate in that form.

[57] Senate Committee Print No. 1, 95th Cong., 2d Sess.,§ 804(b)(4).

provision under unfair practices. That is the provision that is now codified as Section 1692f(8), and it prohibited a debt collector from using any language or symbol on an envelope except the debt collector's return address and name. Had Congress wanted to mimic in Section 1692f(8) the language it used in Section 1692b(5) by prohibiting only language that indicated that the matter related to debt collection, Congress knew how to do so and could have. Congress' use of different language in these two different provisions evidences Congress' intent with respect to Section 1692f(8) – to prohibit all language on envelopes containing collection notices.

The Court of Appeals did not consider this important legislative history to Section 1692f(8). Had it done so, it would have reached the correct decision. The issue of what legislative history courts should look at in interpreting provisions of the FDCPA is an important federal issue that this Court has not yet decided, but should settle.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-20834

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

POOJA GOSWAMI, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

VERSUS

AMERICAN COLLECTIONS ENTERPRISE, INC.,
Defendant-Appellee.

July 28, 2004, Filed

COUNSEL: For POOJA GOSWAMI, Individually, and on behalf of all others similarly situated, Plaintiff - Appellant: Matthew Brian Probus, Wauson & Associates, Sugar Land, TX.

For AMERICAN COLLECTIONS ENTERPRISE INC, Defendant - Appellee: David C Sander, Scanlan, Buckle & Young, Austin, TX.

JUDGES: Before DAVIS, PRADO and PICKERING, Circuit Judges.

OPINION BY: W. EUGENE DAVIS

OPINION: W. EUGENE DAVIS, Circuit Judge: Plaintiff Pooja Goswami ("Goswami") challenges the district court's order granting defendant American

Collections Enterprise, Inc.'s ("ACEI") motion for summary judgment. Plaintiff alleged that ACEI's collection practices violated the Fair Debt Collections Practices Act ("FDCPA"), in particular 15 U.S.C. §§ 1692f(8) because it placed a "priority letter" marking on the collection letter envelope; and under § 1692e(10) because it misled plaintiff about the terms of a settlement offer in the body of the letter itself. We agree with the district court's judgment denying relief for the markings on the envelope. We disagree, however, with the district court's finding that the statement in the body of the letter is not deceptive and in violation of § 1692e(10); the letter leads an unsophisticated consumer to falsely believe that the settlement offer is a one time, take-it-or-leave-it offer. Therefore, we AFFIRM in part, REVERSE in part, and REMAND.

I.

Defendant ACEI, a debt collector, contracted with Capital One in 2001 to provide debt collection services. Under the terms of the collection agreement, Capital One assigned delinquent accounts to ACEI for collection, and ACEI collected these debts on a contingent fee basis. Under the collection agreement Capital One gave ACEI the authority to settle any of its accounts at a discount according to the following formula:

Account Balance	Days Since Charge-Off			
	0-90	91-180	181-730	> 730
$ 0 - $ 1,500	70 %	70 %	50 %	50 %
$ 1,501 - $ 3,000	70 %	50 %	50 %	50 %
> $ 3,000	70 %	50 %	40 %	40 %

Plaintiff Goswami owed approximately $ 900 on her Capital One credit card and failed to pay. Capital One referred that debt to ACEI for collection on March 20, 2001, and ACEI pursued Goswami's delinquent account. It sent a collection notice letter to Goswami on December 7, 2001. A second form letter was sent on January 25, 2002, more than 180 days after the debt had been referred to ACEI. The second letter was sent to Goswami in an envelope which bore a half inch thick blue bar across the entire envelope which contained the words "Priority Letter" in white. ACEI admitted that the markings on the envelope had been developed to entice debtors to open the letter. The letter itself contained a second blue bar and "Priority Letter" marking as a header. The debt collection letter read, in relevant part:

***** Settlement Offer & Amnesty Period *****

We are sending this letter in an attempt to clear your long and overdue account. Effective immediately, and only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty percent (30%) discount off your above balance owed.

This settlement must be in one payment and must be received in our office no later than 30 business days

from the date of this letter unless you contact our office to make other arrangements.

After receiving the letter Goswami filed a complaint alleging violation of the FDCPA, in particular 15 U.S.C. §§ 1692f(8) and 1692e(10). Goswami complains that the markings on the envelope violate § 1692f(8), which prohibits any markings on debt collection letter envelopes besides the name and address of the sender and the addressee. She further complains that the contents of the letter were deceptive in violation of § 1692e(10).

ACEI moved for summary judgment arguing that neutral or benign expressions on an envelope, like "priority letter," that in no way indicate that it is a collection letter are not banned by the FDCPA. It further argued that the letter itself was not deceitful and thus did not violate the Act. The district court agreed, granted the defendant's summary judgment motion, and dismissed the case. Goswami appeals that judgment.

II.

We review the grant of summary judgment *de novo*, applying the same standards as the district court in determining whether summary judgment is appropriate. Walker v. Thompson, 214 F.3d 615, 624 (5th Cir. 2000). We must, therefore, find any disputed facts in favor of the non-moving party and determine whether there exists a genuine issue of material fact in the case. *Id.* All questions of law are reviewed *de novo*. *Id.* Given the lack of any real dispute of the facts in this

case, we need only review *de novo* the district court's interpretation of the FDCPA.

A.

Goswami asserts that the "priority letter" markings on the outside of the envelope violate the FDCPA which, plaintiff asserts, bars any markings on the outside of the envelope besides addresses. Goswami relies on 15 U.S.C. § 1692f, which provides in relevant part:A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

ACEI counters that the legislative history of the FDCPA, FTC interpretations of § 1692f, and case law allow for harmless words or symbols on the outside of the envelope so long as they do not indicate that the correspondence is a debt collection letter.

In interpreting statutes we do not look beyond the plain meaning of the statute unless the statute is absurd or ambiguous. Without ambiguity we are not permitted to look to the legislative history or agency interpretations. *See* Hightower v. Tex. Hosp. Ass'n, 65 F.3d 443, 448

(5th Cir. 1995) ("Only if the language is unclear do we turn to the legislative history."); *see also* Tex. Sav. & Cmty. Bankers Ass'n v. Fed. Housing Fin. Bd., 201 F.3d 551, 554 (5th Cir. 2000) ("When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

In this case, however, the statutory provision in question *is* ambiguous, i.e., it is open to more than one reasonable interpretation. If we read § 1692f(8) in isolation it is reasonable to understand it as barring any markings on the outside of a debt collection letter envelope other than the names and addresses of the parties.

If, on the other hand, we read § 1692f(8) together with the opening paragraph or preface of § 1692f, then the provision takes on another reasonable meaning. Section 1692f begins by establishing its objective as prohibiting unfair and unconscionable conduct by debt collectors. The section then lists specific unfair or unconscionable conduct that is prohibited. Under this reading of the statute, subsection eight only prohibits markings on the outside of envelopes that are unfair or unconscionable, such as markings that would signal that it is a debt collection letter and tend to humiliate, threaten, or manipulate debtors.

Either interpretation of this statute is reasonable and thus the statute is ambiguous. *See* Commissioner v.

Engle, 464 U.S. 206, 217, 78 L. Ed. 2d 420, 104 S. Ct. 597 (1984) ("Each of these possible interpretations of [the statute] can be reconciled with the language of the statute itself. . . . Our duty then is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." (internal quotation marks omitted)). Given this ambiguity we are permitted to look to the statute's legislative history and any FTC interpretations of the provision. Hightower, 65 F.3d at 448; Bolen v. Dengel, 340 F.3d 300, 310 (5th Cir. 2003).

We are most persuaded by the FTC's commentary on the statute: n1 Harmless Words or Symbols. A debt collector does not violate this section by using an envelope with words or notations that do not suggest the purpose of the communication. For example, a collector may communicate via an actual telegram or similar service, that uses a Western Union (or other provider) logo and the word "telegram" (or similar word) on the envelope, or a letter with the word "Personal" or "Confidential" on the envelope.

FTC Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50108 (Dec. 13, 1988). The FTC therefore interprets § 1692f(8) to allow benign or harmless language, like "priority letter," to appear on the outside of the envelope.

This interpretation by the FTC is fully supported by the legislative history. The Senate report on the bill makes clear that § 1692f(8) was intended merely to prevent debt collectors from embarrassing debtors by

announcing the delinquency on the outside of a debt collection letter envelope:A debt collector is prohibited from using any unfair or unconscionable means to collect debts. The following enumerated practices are violations: . . . . communicating information about a debt by postcard; and using symbols on envelopes indicating that the contents pertain to debt collection.S. Rep. No. 95-382, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1702.

Finally, it appears that all courts that have considered this issue have adopted a benign language exception to § 1692f(8) that would allow for markings like "priority letter." *See* Lindbergh v. Transworld Sys., Inc., 846 F. Supp. 175, 180 (D. Conn. 1994); Johnson v. NCB Collection Servs., 799 F. Supp. 1298, 1305 (D. Conn. 1992); Masuda v. Thomas Richards & Co., 759 F. Supp. 1456, 1466 (C.D. Cal. 1991).

Given this persuasive authority, we are convinced that the FDCPA does not bar the innocuous "priority letter" markings in this case. Nothing about the marking "priority letter" intimates that the contents of the envelope relate to collection of delinquent debts, and thus the language is neither threatening nor embarrassing. We therefore agree with the district court that the FDCPA does not bar the benign markings on the envelope in this case.

III.

Goswami further argues on appeal that the language of the debt collection letter itself is deceptive in violation of § 1692e(10) of the FDCPA because it gives a false sense of urgency, falsely implies that criminal actions

are pending, and leads debtors to falsely believe that the settlement offered is the one and only chance to settle the debt with Capital One. She therefore, contends that the district court erred in granting defendant's motion for summary judgment on the deception claim. ACEI contends that the letter, when read as a whole, is in no way misleading and that therefore the district court correctly granted summary judgment.

Section 1692e(10) was enacted to thwart abusive, false, or misleading debt collection practices. It provides in relevant part: A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

We must evaluate any potential deception in the letter under an unsophisticated or least sophisticated consumer standard. Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1236 (5th Cir. 1997). That is, in determining whether the defendant's actions are deceptive under the FDCPA we must assume that the plaintiff-debtor is neither shrewd nor experienced in dealing with creditors. This standard serves the purpose of protecting all consumers, "including the inexperienced, the untrained and the credulous, from deceptive debt collection practices[.]"

Id. At the same time we do not consider the debtor as tied to the "very last rung on the [intelligence or] sophistication ladder." *Id.* (internal quotation marks omitted). We review the potential deceptiveness of ACEI's representations according to this standard.

Goswami first argues that the use of the "priority letter" language on the top of the letter is deceptive because it creates a false sense of urgency. She further argues that the use of the term "amnesty" in the "Settlement Offer & Amnesty Period" heading of the debt collection letter was deceptive because it suggested that Goswami needed amnesty from criminal prosecution, amounting to a veiled threat that criminal proceedings were possible.

Neither of these representations in the letter is false, deceptive, or misleading to even the least sophisticated consumer. The "amnesty" reference clearly refers to the debt forgiveness offer in the body of the letter and consumers, even unsophisicated consumers, would not believe otherwise. The "priority letter" language is also harmless. It appropriately expresses the importance of correspondence concerning long overdue accounts and would not serve to intimidate or threaten even the most gullible debtor. We therefore agree with the district court that such language does not serve as the basis for a FDCPA claim.

The body of the debt collection letter, however, triggers greater concern. The letter states, falsely, that "only during the next thirty days, will our client agree to settle your outstanding balance due with a thirty (30%) percent discount off your above balance owed." (Emphasis added). In actual fact, Capital One had

authorized ACEI to give debtors such as Goswami a 30% discount at *any time*, not just for a period of thirty days. In fact, ACEI was authorized to offer a 50% discount at the time Goswami received the collection letter in question. The statement in the collection letter is untrue and makes it appear that Capital One's offer of a 30% discount was a one-time, take-it-or-leave-it offer that would expire in thirty days. The obvious purpose of the statement was to push Goswami to make a rapid payment to take advantage of the purported limited time offer.

Defendant argues that courts have been eager to allow debt collection agencies to offer settlement discounts to debtors and that the settlement offer in this case should therefore be permitted. Courts favor such settlement offers because they "result in the resolution of the debt without resorting to litigation, saving all parties involved the needless cost and delay of litigation[.]" Lewis v. ACB Business Servs., Inc., 135 F.3d 389, 399 (6th Cir. 1998).

While we agree that it is important to permit collection agencies to offer settlements, that policy consideration does not remove collection agencies' obligation under the FDCPA to deal in a nondeceitful manner. A collection agency may offer a settlement; however, it may not be deceitful in the presentation of that settlement offer, as ACEI was in this case. ACEI made false or misleading statements about the settlement authority it held from Capital One both in the discount it was authorized to offer and the time within which Goswami was allowed to accept the offer. ACEI's deception is actionable under the FDCPA and is not

excused because it is part of a debt collector's settlement offer.

We therefore agree with the district court's order insofar as it grants summary judgment on the "priority letter" and "amnesty" language. But we disagree with the district court's determination that the substance of the settlement offer is not deceptive under the FDCPA.

IV.

For the above reasons we affirm the district court's order granting summary judgment with respect to the § 1692f(8) claims regarding the language on the debt collection letter envelope; we also affirm the district court's order with respect to the dismissal of the § 1692e(10) claims regarding the "priority letter" and "amnesty" language in the debt collection letter. However, we reverse the district court's order granting summary judgment on the claims for representations made in the body of the debt collection letter.

AFFIRMED in part, REVERSED in part, and REMANDED.

Footnotes

n1 "The Supreme Court has ruled that 'interpretations such as those in opinion letters--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant *Chevron*-style deference.'" Bolen v. Dengel, 340 F.3d 300, 310 (5th Cir. 2003) (quoting Christensen v. Harris Cty., 529 U.S. 576, 587, 146 L. Ed. 2d 621, 120 S. Ct. 1655 (2000)). Although the FTC

staff commentary on § 1692f(8) was opened to public comment, it was not a formal regulation, did not carry the force of law, and did not undergo full agency consideration. In fact the FTC makes clear in the commentary itself that the interpretations are advisory and are not binding on the public or the FTC:

[The commentary] is a guideline intended to clarify the staff interpretations of the statute, but does not have the force or effect of statutory provisions. It is not a formal trade regulation rule or advisory opinion of the Commission, and thus is not binding on the Commission or the public.

The Commentary is based primarily on issues discussed in informal staff letters responding to public requests for interpretations and on the Commission's enforcement program, subsequent to the FDCPA's enactment.

FTC Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50101 (Dec. 13, 1988). As such we do not give the commentary full *Chevron* deference. "Instead, interpretations contained in formats such as opinion letters are entitled to respect . . . but only to the extent that those interpretations have the power to persuade." Christensen, 529 U.S. at 587. We, therefore, consider the FTC staff commentary in this case only insofar as it is persuasive.

CIVIL ACTION H-02-1318

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

POOJA GOSWAMI,
Plaintiff,

Versus

AMERICAN COLLECTIONS ENTERPRISE, INC., et al.,
Defendants.

August 7, 2003, Decided
August 9, 2003, Opinion Filed

COUNSEL: For Plaintiff: John Wesley Wauson, Sugar Land, Tx.

For American Collections, Defendant: David Sander, Austin, Tx.

JUDGES: Lynn N. Hughes, United States District Judge.

OPINION BY: Lynn N. Hughes

OPINION:

Opinion on Summary Judgment

1. *Introduction.*

The government protects debtors from having collectors (a) fail to disclose the basis for the claim, (b) badger them by embarrassing them through mail seen by the public, (c) disrupt their work by calling the office, and (d) make deceptive representations. The government does not undertake to protect debtors from the natural consequences of their delinquency, like feeling ashamed and having to deal with collectors. A company that uses neutral terms on an envelope, offers a settlement in negotiating a debt, and uses the word "amnesty" does none of the things the law disallows.

2. *Background.*

Pooja Goswami had an overdue balance of about $ 900 on her Capital One credit card. It is a clean account debt; she simply charged more stuff on her card than she could afford. She did not make alternative credit arrangements, get a job, or otherwise meet her responsibilities to Capital One, which retained American Collections to help it.

In a letter titled "Settlement Offer & Amnesty Period," American told Goswami that, for thirty days from the date of the letter, Capital One would settle her account with a 30% discount off the balance due. To get the discount, she had to pay the entire balance at once. The letter also said that she could contact American to make other arrangements if she could not pay the full balance at that time. The outside of the envelope displayed the phrase "Priority Letter" along with the postage, Goswami's address, and return address.

Goswami claims that the phrase "Priority Letter" is barred by the law; the limited time to accept is misleading; and the use of "amnesty" implicitly threatens criminal prosecution. Both parties move for summary judgment.

3. *Statute.*

Federal law bars debt collectors, like American, from misrepresenting the character of a debt or using misleading practices to collect one. Fair Debt Collection Practices Act, *15 U.S.C § § 1692e, 1692f.*

One part of the law bans messages on envelopes. A strict interpretation--that the act prohibits all writing, save addresses, on envelopes addressed to debtors--would violate the Constitution. The government may intrude on free expression only if its regulations are precisely drawn to serve a compellingly cogent governmental interest. While this kind of social meddling has been tolerated by a supine judiciary, it cannot be read to ban messages that do not relate to embarrassing the debtor because of her status as a debtor. A collection notice could bear on the envelope an advertisement for an Internet service or for beauty products, for they would have no relation to any governmental interest in debtor sensitivity.

One could argue that a blanket ban of messages on collection notices keeps the governmental out of the dangerous habit of deciding which texts are permissible and which are not. Administrative convenience is not a compelling interest. Eliminating more speech is not a solution to the complex charge of devising constitutionally-tolerated trespasses on free speech.

U.S. CONST. amend. I; see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980).*

The sections under which Goswami sues are meant to protect debtors from extra embarrassment by shielding the nature of debt collection letters from others. Phrases like "Priority Mail" or "Deliver to Addressee Only" or "Remember Our Troops" or "Votes for Women" imply nothing about the message inside. To construe the statute to punish the use of neutral terms like these advances no government interest and would violate the Constitution. Fortunately, the act can easily be understood to bar messages about debt collection--messages that a disinterested, reasonable person would understand to be exhibiting the addressee's status as a deadbeat.

4. *Contract.*

Goswami argues that the letter's assertion about a 30% discount available for 30 days was deceptive because the contract between the collector and the creditor allowed discounts of up to 50% without a specific time limit. She is not a party to the American-Capital One contract, nor is she a beneficiary of it.

Goswami understands the statute to require an agent to disclose its principal's confidential instructions about levels of compromise. If her position were correct, collection agencies--and negotiations to settle debts--would be eliminated entirely.

A negotiating position is not exactly a fact; it is a contingent fact, binding as fact only if it is accepted.

Bidding low is not deceitful. The letter was an offer--a negotiating position. The law does not bar American from offering to settle the debt at a thirty percent discount with no questions asked for thirty days. Under the statute, American's statements might be false if it intended when it sent the letter to reject Goswami's payment, or if it actually rejected her payment after she accepted the offer. Goswami did not accept the offer, so she cannot claim latter; she has no proof of the former.

5. "*Amnesty.*"

The letter offered an amnesty. Goswami construes this as a threat to bring criminal charges because amnesties apply only to government prosecutions. The average American consumer does not have a clear idea of what "amnesty" means. American's references to its "client" mean the principal employing American, not a government agency. These references would not lead an unsophisticated consumer to believe that American, Capital One, or the government had the authority to grant amnesty or that they intended--or were engaged in--criminal legal action against her. Nothing in the letter or Goswami's relationship with Capital One implies governmental power. American did not imply that it could act for the government. Assuming that Goswami had this apprehension--an unlikely state of reality since she did not mention it until her amended complaint--her subjective misunderstanding of the letter does not mean that the letter was illegal. Amnesty refers to an "an intentional overlooking" as the Oxford dictionary has it. Even if it were strictly limited to the "pardon" sense, its use by a bill collector

would be either poor writing or metaphorical, not threatening.

6. *Conclusion.*

American did not violate the law about debt collection; nothing in the letter was dishonest. The letter did remind Goswami that she did not pay her debts as she promised; that is part of the nature of her choice to spend and not to pay. The letter offered a reduction in that debt if she would pay part of it. She cannot make herself into a victim by a twisted interpretation of a routine commercial letter. The process was legal. Goswami's will take nothing from American.

Signed August 7, 2003, at Houston, Texas.

Lynn N. Hughes
United States District Judge

Final Judgment

1. Goswami's motion for summary judgment is denied (24).

2. On American's motion, Pooja Goswami takes nothing from American Collections Enterprise, Inc. (12, 55).

3. Goswami's claims against Capital One having been dismissed with prejudice, this is a final judgment.

Signed August 7, 2003, at Houston, Texas.

Lynn N. Hughes
United States District Judge

No. 03-20834

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

POOJA GOSWAMI, Individually, and on behalf of all others similarly situated,
Plaintiff-Appellant,

VERSUS

AMERICAN COLLECTIONS ENTERPRISE, INC.,
Defendant-Appellee.

December 22, 2004, Filed

COUNSEL: For Plaintiff-Appellant POOJA GOSWAMI: Matthew Brian Probus, Wauson & Associates, Sugar Land, TX.

For Defendant-Appellee AMERICAN COLLECTIONS ENTERPRISE, INC.: David C. Sander, Scanlan, Buckle & Young, Austin, TX.

JUDGES: Before DAVIS and PRADO, Circuit Judges. * JERRY E. SMITH, Circuit Judge, with whom DeMOSS, Circuit Judge, joins dissenting from the denial of rehearing.

OPINION: ON PETITION FOR REHEARING

(Opinion July 28, 2004, 5th Cir. 2004, ___F.3d___)

PER CURIAM:

Appellant, in his petition for rehearing, argues that the panel opinion is inconsistent with Peter v. GC Servs., L.P., 310 F.3d 344 (5th Cir. 2002). We disagree because Peter is completely distinguishable from our case. It is true that in Peter, the panel concluded that the language on the envelope violated § 1692f(8). However, in Peter, the envelope from the collection agency bore the return address of the U.S. Department of Education. The panel concluded that impersonation of the Department of Education caused the envelope to be in violation of this subsection and the court focused on the debt collector's deceptive practice of impersonating the Department of Education. The panel in Peter relied on the Senate Report to the FDCPA and stated:The Senate Report accompanying the FDCPA explained that the purpose of the act was "to protect consumers from a host of unfair, harassing and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors." S. REP. NO. 95-382, at 1-2, *reprinted in* 1977 U.S. Code Cong. & Admin. News 1695, 1696. One of the deceptive practices Congress was concerned about was "impersonating public officials".

The panel explicitly declined to consider whether to adopt a "benign language exception" n1 because, under the facts, "any implicit exception for benign language cannot be stretched to cover that thoroughly disapproved practice." Peter, (310 F.3d at 352).

It is also significant that since our opinion issued, the Eighth Circuit in Strand v. Diversified Collection Services, 380 F.3d 316 (8th Cir. 2004), decided a case involving § 1692f(8), which is completely consistent

with our opinion. Thus, our research discloses no reported case that is inconsistent with our opinion.

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED, and the court, having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. And 5th Cir. R. 35), the Petition for Rehearing En Banc is also DENIED. **

DISSENT BY: JERRY E. SMITH

DISSENT: JERRY E. SMITH, Circuit Judge, with whom DeMOSS, Circuit Judge, joins dissenting from the denial of rehearing en banc:

The panel has made an erroneous interpretation of this important statute. n2 More significantly, it has invented a new and unusual means of interpreting statutes that have general introductory statements, or preambles, followed by specific provisions. Because the court should have taken this matter en banc to correct the error, I respectfully dissent.

The panel agrees, Goswami, 377 F.3d at 493, that the envelope in question easily violates the plain wording of 15 U.S.C. § 1692f(8), which prohibits "using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails . . . ." Not only do the words "Priority Letter" in a blue strip across the face of the envelope run afoul of this specific proscription, but, as the panel accurately acknowledges, the debt

collector "admitted that the markings on the envelope had been developed to entice debtors to open the letter." Goswami, 377 F.3d at 491.

The panel also correctly opines that "we do not look beyond the plain meaning of the statute unless the statute is absurd or ambiguous. Without ambiguity we are not permitted to look to the legislative history or agency interpretation." Id. at 492. The panel finds ambiguity not in subsection 8, but by "reading § 1692f(8) together with the opening paragraph or preface of § 1692f." Id. at 493.

This is error. The preamble is extremely general and contains only two terms that the panel employs to create ambiguity: that a debt collector may not use "unfair or unconscionable means" to collect a debt. No reported case, nor any regulation, nor the legislative history, nor any agency interpretation or commentary makes mention of the preamble to limit the reach of subsection 8, n3 nor did the debt collector argue or suggest that the introductory language should be considered at all. Use of the two general words of the preamble ("unfair or unconscionable") to overrule the specific proscription of subsection 8 is purely a concoction of the panel. n4

In contrast to the general language in the introduction, subsection 8 is specific in prohibiting "any language or symbol" other than an address. Although the panel fails even to mention it, this matter should be controlled by the well-accepted interpretive maxim that specific provisions prevail over general ones. n5 It is a mystery why the panel did not even try to grapple with this important rule. In light of the panel opinion, and this

court's refusal to rehear it en banc, one is left to wonder whether this bedrock of statutory interpretation retains viability in this circuit.

The panel opinion, moreover, is at odds with a recent opinion of this court, Peter v. GC Servs., L.P., 310 F.3d 344 (5th Cir. 2002), which interprets the same subsection at issue here--§ 1692f(8)--but reaches a contrary result. The *Peter* case was briefed extensively to the panel, and the reader is left to guess why the panel makes no reference to it.

In *Peter*, the plaintiff alleged that the debt collector (which was collecting on a student loan) had violated subsection 8 by including, on the envelope, the words "US Department of Education" followed by a post office box address and the words "Official Business/Penalty for Private Use, $ 300." The panel in *Peter* noted, 310 F.3d at 351, that "we may not look beyond the text of the statute except in those rare instances where using the plain meaning of the text creates an 'absurd result'" (citation omitted). The panel held that "if § 1692f(8) is read as a whole, no absurd result ensues, meaning we need not inquire beyond the statutory text." *Id.*

Thus, the panel in *Peter* held that the envelope was a violation of the statute. *That panel made no mention of the preamble on which the* Goswami *panel so heavily relies. To the contrary, it used only the explicit, unambiguous text of subpart 8 to decide the issue.*

Specifically in regard to another section of the same Act (§ 1692e(14)), the panel in *Peter* noted that it was "enacted against a backdrop of cases in which courts held that communications designed to create a false

sense of urgency were deceptive." Id. at 352. That conclusion logically applies to the entirely of the Fair Debt Collection Practices Act, including § 1692f(8). Surely, in the present case (*Goswami*), the inclusion, in a bright blue strip, of the words "Priority Letter" on the envelope creates the sort of false sense of urgency that the panel condemned in *Peter*.

Moreover, the *Goswami* panel holds that there is no violation unless the envelope indicates that it "relates to collection of delinquent debts." In imposing liability, the panel in *Peter* logically decided to the contrary.

Curiously, although failing to mention the recent, binding Fifth Circuit authority (*Peter*), the *Goswami* panel relies on three district court opinions from California and Connecticut. In the process of ignoring *Peter*, the panel, 377 F.3d at 493, invents a new test for interpreting subsection 8: that it prohibits only "markings that would signal that it is a debt collection letter and tend to humiliate, threaten, or manipulate debtors." This is pure judicial legislation. The panel boldly makes up these words out of whole cloth, reflecting, presumably, the scope the panel wishes the statute to have.

These words find no basis in any reported case, or in the statute, or in any regulations, legislative history, or agency interpretation or commentary. The panel's newly-enunciated test would require a different result in *Peter*, because adding "US Department of Education" to the envelope does not humiliate, threaten, or manipulate. The conflicting results in *Goswami* and *Peter* cannot be reconciled.

The panel opinion is pure legislation from the bench. The opinion may have reached a result with which the panel feels comfortable, but it clouds this court's statutory interpretation jurisprudence, especially regarding whether a couple of general words in a preface or preamble can be used by clever lawyers to override specific provisions that unmistakably set forth the will of Congress.

Parties and counsel now are in genuine doubt whether, as to the statute at issue, *Peter* or *Goswami* represents the binding law of the circuit. Because the court should take this case en banc to reconcile the conflict, I respectfully dissent.

Footnotes

* Judge Pickering was a member of the original panel but retired on December 8, 2004, and did not participate in this decision.

n1 See Peter, 310 F.3d at 351 (5th Cir. 2002), stating "We do not need to reach the issue of whether § 1692f(8) implicitly includes an exemption for benign language, since the Defendants' impersonation of the Department of Education is certainly not benign".

** Judge Clement is recused and did not participate in the consideration of the petition for rehearing en banc.

n2 *See* Goswami v. Am. Collections Enter., Inc., 377 F.3d 488, 492-94 (5th Cir. 2004). I dissent only in regard to the panel's result and reasoning regarding the words added to the envelope. I express no view as to the content of the letter.

n3 One of the three district court cases on which the panel relies, Masuda v. Thomas Richards & Co., 759 F. Supp. 1456 (C.D. Cal. 1991), actually reads the introductory language to *expand* the scope of the section beyond the proscriptions set forth in the eight subsections of § 1692f. *See* id. at 1461 n.10.

n4 Nor is consideration of the introductory language incompatible with enforcement of subsection 8 as written. I assume even the panel would agree that if it had wanted to, Congress could have said that (1) a debt collector may not use "unfair or unconscionable means," and (2) those words are "hereby defined to include using any language other than the collector's address." If Congress had done it that way, there is no doubt this plaintiff has established a violation, because the envelope contravenes that precise standard.

But in fact, that is exactly what Congress *did* do in this statute, in language that is not much different. It said that (1) a debt collector may not use "unfair or unconscionable means," and (2) the following conduct is a violation: using any language other than the collector's address.

n5 "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling." Fourco Glass Co. v. Transmirra Corp., 353 U.S. 222, 228-29, 1 L. Ed. 2d 786, 77 S. Ct. 787 (1957) (ellipses in original, internal quotations and citation omitted). "As a fundamental rule of statutory interpretation, specific provisions trump general

provisions." Navarro-Miranda v. Ashcroft, 330 F.3d 672, 676 (5th Cir. 2003). One basic principle of statutory construction is that where two statutes appear to conflict, the statute addressing the relevant matter in more specific terms governs. A similar provision applies to interpretation of various sections of the same enactment. A provision must be considered in context, and the more specific provision within a statute prevails.

United States v. Neary (In re Armstrong), 206 F.3d 465, 470-71 (5th Cir. 2000) (internal citations omitted).

TITLE 15--COMMERCE AND TRADE

CHAPTER 41--CONSUMER CREDIT PROTECTION

SUBCHAPTER V--DEBT COLLECTION PRACTICES

Sec. 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of

the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

(Pub. L. 90-321, title VIII, Sec. 808, as added Pub. L. 95-109, Sept. 20, 1977, 91 Stat. 879.)